No. 215

In the Supreme Court of the United States

OCTOBER TERM, 1940

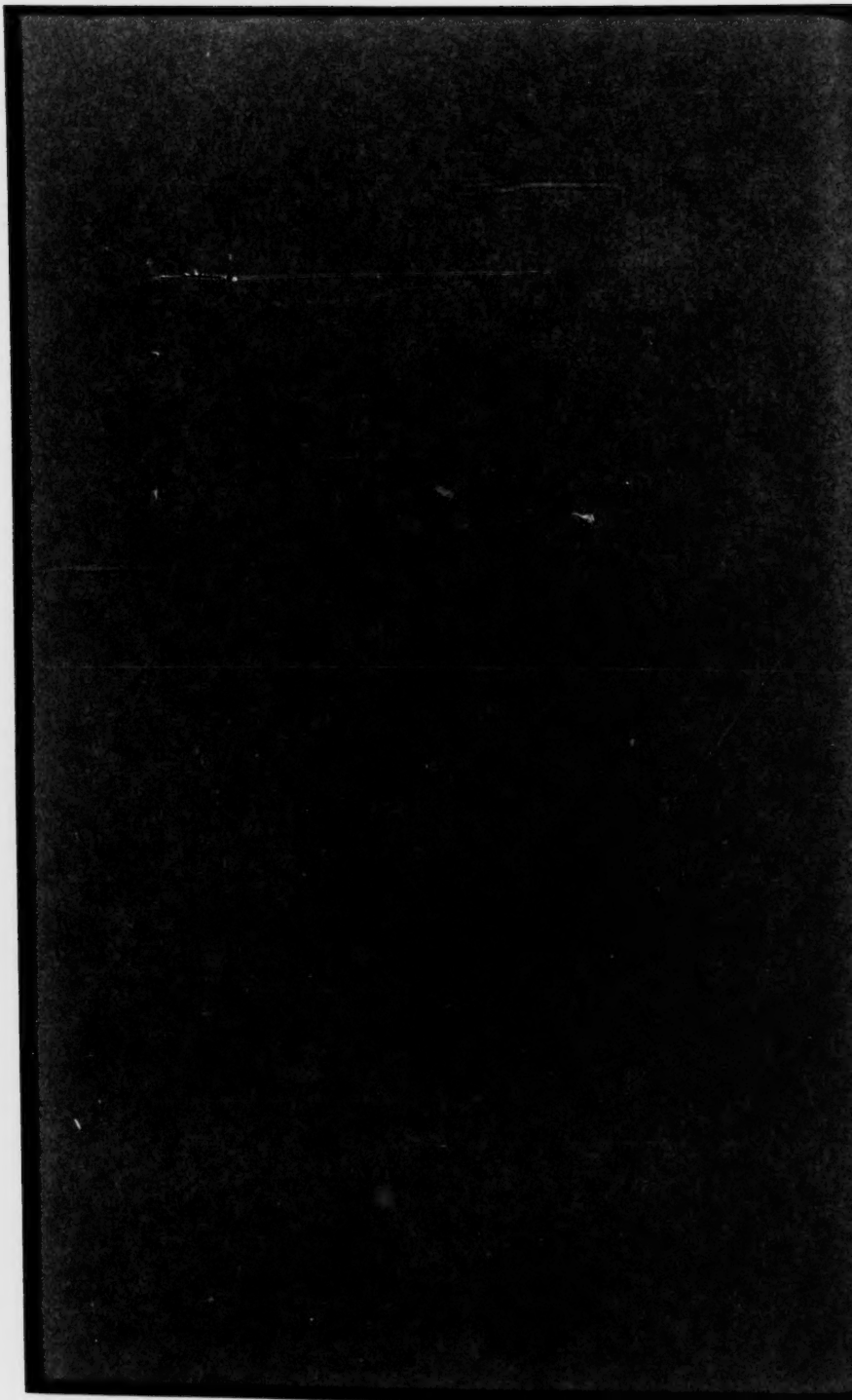
TOVREA PACKING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION



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OPINIONS BELOW

The opinion of the court below (R. 532–543) is reported in 111 F. (2d) 626. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 61–108) are reported in 12 N. L. R. B. 1063.

JURISDICTION

The decree of the court below (R. 544–548) was entered on April 30, 1940. Rehearing was denied on June 20, 1940 (R. 548–549). The petition for writ of certiorari was filed on July 8, 1940. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Petitioner employs persons to operate a feed lot and feed mill which adjoin its packing plant and which are used for fattening livestock preparatory to slaughter; a major part of the fattened livestock is slaughtered and processed at the packing plant. The question is whether these persons are included within the exemption of an "agricultural laborer" under Section 2 (3) of the National Labor Relations Act.

STATUTE INVOLVED

Section 2 (3) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include *any individual employed as an agricultural laborer,* or in the domestic service of any family or person at his home, or any

individual employed by his parent or spouse. [Italics supplied.]

STATEMENT

The pertinent facts, as found by the Board[1] and as shown by the evidence, may be summarized as follows:[2]

Petitioner is engaged in the purchase, feeding, and slaughtering of livestock and in the processing and marketing of meat products and various by-products (R. 67–68; R. 110–113, 187–188). The present case concerns persons engaged in the preparation of feed and the feeding of cattle at a feed mill and feed lots maintained by petitioner immediately adjacent to its packing plant (R. 68–69; R. 215). The function of the feed mill and lots is to fatten for slaughter cattle purchased full-grown by petitioner (R. 69–70; R. 189, 213–223, 247, 248). During the year 1936 some 60 per cent of the ani-

[1] The Board issued its findings of fact, conclusions of law, and order (R. 61–108), after the usual proceedings pursuant to Section 10 of the National Labor Relations Act, *i. e.:* amended charge (R. 8–11), complaint (R. 11–19, 109–110), a copy of which was served upon the Tovrea Employees Association, a labor organization alleged in the complaint to be company-dominated, answer (R. 21–23), motion by the Association to intervene and order granting the motion (R. 23–27), hearing before a Trial Examiner, Intermediate Report of the Examiner (R. 28–61), exceptions thereto by petitioner, oral argument, and the filing of briefs before the Board (R. 67).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

mals fattened at the plant feed lots were slaughtered and processed at petitioner's plant; the remainder were shipped elsewhere for slaughter (R. 70; R. 422). While different employees and foremen are utilized, the plant and the adjoining feed lots are both under the direction of petitioner's general manager[3] (R. 70; R. 232–233, 412). Petitioner also maintains four feed ranches, not adjacent to the plant (R. 189–190); only a small proportion of the cattle slaughtered at the plant is fattened on these ranches.[4]

The Board found that the feed lots and mill were maintained "as an incident to and as a part of" petitioner's packing house operations and that the employees' work was "incidental to the commercial activities of * * * [petitioner] carried on at its packing plant, rather than incidental to ranching operations" (R. 70, 72). It therefore rejected petitioner's contention that the feed lot and mill employees were within the "agricultural laborer" exemption under Section 2 (3) of the

[3] The evidence also shows that the same machine shop is used to service and repair both the feed mill and feed lot machinery and equipment and the machinery inside the packing plant itself (R. 252). Carpentry repair work is also handled as a unit (R. 521).

[4] In 1937, about 54 per cent of the cattle slaughtered at petitioner's plant came from its own feed lots, including those adjacent to the plant and those maintained by petitioner on its ranches (R. 70; R. 189–190). Since 51 per cent of all the cattle slaughtered were fattened at the feed lots adjoining the plant (R. 233), only 3 per cent came from petitioner's other feed lots.

Act. The Board ordered petitioner to cease and desist from certain unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act and to take certain affirmative action found appropriate to effectuate the policies of the Act.[5] On August 5, 1939, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 496–502). On April 30, 1940, the court handed down its opinion (R. 532–543) and entered a decree (R. 544–548) enforcing the Board's order except for the provision requiring petitioner to reimburse governmental relief agencies for payments made by those agencies to the employees discriminatorily discharged. On June 20, 1940, the court denied a petition for rehearing filed by petitioner (R. 548–549).

[5] The Board found that petitioner had illegally discriminated against nine of the feed mill and feed lot employees, had interfered with, dominated, and supported the Association, a labor organization admitting to membership all employees at the packing plant, and had restrained and coerced its employees in the exercise of their rights of self-organization and collective bargaining (R. 73–99, 104–105). The Board's order required petitioner to cease and desist from giving effect to its contract with the Association, as well as from its unfair labor practices; to withdraw recognition from and disestablish the Association as a bargaining representative of the employees; to offer reinstatement with back pay to the nine employees discriminated against; to pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the nine employees on work-relief projects; and to post appropriate notices (R. 105–108). The order dismissed the complaint as to 16 other employees, as well as with respect

ARGUMENT

1. The Board found that the work of the persons employed at the feed mill and lots adjoining petitioner's plant is incidental to and a part of petitioner's packing-house operations—an admittedly industrial enterprise.[6] Since these findings have the requisite support (*supra,* pp. 3–4), there can be little question but that the workers in question are not within the exemption of an "agricultural laborer" under Section 2 (3) of the Act. See *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 257–259. The holding below that the Board's findings are adequately supported raises no question of general importance.[7]

2. The court below held (R. 536) that the "nature of the work" done by an employee is not

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to allegations that petitioner had refused to bargain collectively in violation of Section 8 (5) of the Act (R. 108).

[6] The petition apparently concedes that the services of the employees were rendered "in proximity to and as an incident to an industrial operation" (Pet. 5, 8, 13).

[7] Petitioner's attempt (Pet. 5, 13–14) to break down the persuasive combination of circumstances upon which the Board and the court below relied and to interpret the decision below as a holding that the "agricultural laborer" exemption would not apply whenever a normally agricultural pursuit is carried on either in close proximity to an industrial plant which utilizes its product or for an employer principally engaged in industry, appears to be but the common effort to overcome a reasonably clear application of the Act by the "simple and familiar dialectic of suggesting doubtful and extreme cases." *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467.

alone decisive upon the question whether he is an "agricultural laborer," and that the nature of the enterprise must also be considered. The decision is in accord with the available indications of the intent of Congress,[8] is not in conflict with any other decision,[9] and is plainly correct: the cannery em-

[8] The Social Security Act, as passed in 1935, exempted "agricultural labor" (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., Supp. IV, Secs. 410, 1011, 1107). In the reports of the legislative committees upon the proposed 1939 amendments to the Social Security Act, it is stated that "under existing law" the feeding of livestock is agricultural labor "only if performed in the employ of the owner or tenant of the farm" on which it is performed. Senate Report No. 734, 76th Cong., 1st Sess., p. 62; House Report No. 728, 76th Cong., 1st Sess., p. 51. While Congress, in adopting amendments in 1939 which broadened the Social Security Act "agricultural labor" exemption, was concerned with problems of tax collection, etc., which are not applicable under the National Labor Relations Act, it is worthy of note that the exemption was not extended to workers such as those involved in the present case. The amendments define "agricultural labor" as services performed "On a farm * * * including the * * * feeding * * * and management of livestock". Act of August 10, 1939, c. 666, 53 Stat. 1360, Sec. 209 (l) (1). Again, in the Fair Labor Standards Act of 1938, agricultural labor is defined as services "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations". Act of June 25, 1938, c. 676, 52 Stat. 1060, Sec. 3 (f).

[9] While petitioner asserts (Pet. 5, 12–13) that the decision below "is contrary to every judicial interpretation" of the term "agricultural laborer," no conflicting decision is cited and we know of none. The decisions cited by petitioner attach weight, as petitioner itself states (Pet. 8), to the "nature of the enterprise" as well as to the nature of the work. Other decisions have subordinated the character of

ployee who picks out spoiled fruit and vegetables after delivery to the cannery performs the same task as a helper on a farm, but his employment is clearly industrial in nature. Cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board,* 109 F. (2d) 76 (C. C. A. 9th), certiorari denied, No. 853, last Term.

3. The asserted "misstatements of the record" by the court below (Pet. 10–12) are not misstatements and, in any event, are not important. The court's statement (R. 535) that most of the cattle fattened on petitioner's four feeding ranches are not slaughtered at the plant, is supported by a simple mathematical calculation showing that only 3 percent of the cattle coming to the plant are sent from those ranches (note 4, p. 4, *supra*). Nor is it significant that the court did not explain that 40 percent of the cattle fattened at the feed lots adjoining the plant are shipped elsewhere for slaughter; the primary function of the feed lots

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the work to the nature of the enterprise as a criterion. *Boyer* v. *Boyer*, 178 Minn. 512, 227 N. W. 661; *Nace* v. *Industrial Commission*, 217 Wis. 267, 258 N. W. 781; *Maryland Casualty Co.* v. *Dobbs*, 128 Tex. 547, 100 S. W. (2d) 349; *Roush* v. *Heffelbower*, 225 Mich. 664, 196 N. W. 185; *Industrial Commission* v. *Shadowen*, 68 Colo. 69, 187 Pac. 926; *Great Western Mushroom Co.* v. *Industrial Commission*, 82 P. (2d) 751 (Colo.); *Ganzer* v. *Chapman & Barnard*, 157 Okla. 99, 11 P. (2d) 115; *Rumley* v. *Rio Grande Conservancy Dist.*, 40 N. M. 183; 57 P. (2d) 283; *Klein* v. *McCleary*, 192 N. W. 106 (Minn.).

and mill here involved is to fatten cattle for slaughter and processing at petitioner's own plant.[10]

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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[10] It is, in any event, doubtful that the employees would be "agricultural laborers" if none of the cattle were slaughtered at the plant: "Labor performed by an employee for a commercial feeding concern, a livestock commission company or stockyards concern, feeding or raising livestock as a part of commercial operations in the purchase and sale of livestock, would be employment subject to the [Social Security] Act." Montana Unemployment Compensation Commission, *Official Interpretation No. 25* (of the Social Security Act) (Nov. 1937).

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